

DISTRICT OF COLUMBIA TAX COURT

FILED

NOV 1 1954

District of Columbia  
Tax Court

HILICO, INC.,  
Petitioner,  
vs.  
DISTRICT OF COLUMBIA,  
Respondent.

DOCKET NO. 1425

FINDINGS of FACT and OPINION

The petitioning taxpayer here appeals from the assessment of a deficiency in sales tax on the ground that (a) the tax for four months of the taxable period involved is barred by limitations in the Sales Tax Act, (b) the Assessor failed to use proper accounting procedure in determining the tax, and (c) the assessment was arbitrary and capricious.

Findings of Fact

1. The petitioner is a corporation with its principal place of business at 2016 Fourteenth Street, Northwest, Washington, D. C. It is, and was during the taxable period engaged in the retail sale of alcoholic liquors, groceries and the like.

2. The sales of merchandise by the petitioner, with few exceptions, during the taxable period involved, namely from August 1, 1949 to December 31, 1953, were registered by cash registers and recorded on paper tapes in such registers as to number of transaction, amount and general character of the merchandise sold.

3. Upon the effective date of the District of Columbia Sales Tax Act, namely, August 1, 1949, and for the purposes of recording and reporting its sales as required by that Act, the petitioner opened an account or book called "Daily Cash Book" and inaugurated a system whereby the character of the merchandise sold as to taxability

or non-taxability was reported to the Assessor on the paper tapes recorded in the cash register. The plan further involved the transfer of the information on the tapes to the Daily Cash Book, and the use of such latter record in preparing the monthly returns of gross sales and other information required by the Sales Tax Act and the pertinent regulations.

4. Beginning with the month of August, 1949 and for every month thereafter up to and including the month of December, 1953, the petitioner filed with the Assessor its return of gross sales under the Sales Tax Act as reflected by the footings in the Daily Cash Book, and paid the sales taxes shown to be due on such returns.

5. At the end of the taxable period here involved an investigation of petitioner's business was made by an auditor of the Sales and Use Tax Division of the Assessor's office. Although all the books and records of the petitioner were made available to such auditor, his audit or investigation was limited to an examination of invoices showing purchases of merchandise by the petitioner during one year, namely, from September 1, 1952, to August 31, 1953. From such examination he ascertained the total amount of purchases for that fiscal year and the portion thereof that represented the purchase price of taxable and non-taxable merchandise. He then called upon the petitioner for information concerning the "mark-up" on various items of merchandise, that is to say, the difference between the cost and selling price. No period was specified in the request, but its language indicated that such information was to relate to the date of the request, December 21, 1953. Shortly after the first of the calendar year 1954 the petitioner supplied the information relating to such "mark-ups" or differentials, effective as of that time, and during four or five months immediately prior thereto.

6. Thereafter, to wit, on April 21, 1954, the Assessor assessed the petitioner deficiencies in sales taxes, with interest and penalties for the periods and in the amounts following:

<u>Period</u>	<u>Tax</u>	<u>5% Penalty</u>	<u>Interest</u>	<u>Total</u>
Aug. 1 1949 to May 31 1951	\$2,210.37	110.52	\$346.68	\$1,103.67
June 1 1950 to May 31 1951	1,028.97	51.45	286.56	1,366.98
June 1 1952 to May 31 1953	116.03	5.80	9.20	131.03
June 1 1953 to Dec 31 1953	<u>131.07</u>	<u>6.55</u>	<u>4.17</u>	<u>141.79</u>
<b>Total</b>	<u>\$2,168.44</u>	<u>\$108.42</u>	<u>\$646.61</u>	<u>\$2,923.57</u>

7. The petitioner paid the foregoing deficiencies, penalties and interest on May 4, 1954. This proceeding was filed on June 17, 1954.

8. As reflected by the Daily Cash Book, the total receipts from the petitioners' business during the period here involved, namely, fifty-three months, from August 1, 1949 to December 31, 1953, amounted to \$2,090,236.43, consisting of millions of items, most of which in small amounts and many in amounts of a few cents. According to the Daily Cash Book the taxable sales during the taxable period out of the total amounted to \$1,555,188.23, which the petitioner reported monthly and paid the two per centum sales taxes thereon.

9. The business of the petitioner in respect of gross receipts was not constant during the taxable period here involved, but varied substantially from time to time. The largest amount of business done in one month was transacted in the month of August, 1951, and amounted to \$97,949.70, while the smallest amount, namely \$23,304.41, was done in September, 1953. Gross business for the first five months of the taxable period, August 1, 1949 to December 31, 1949, amounted to \$165,417.44, or an average of \$33,139.44 a month. Gross Business for the last six months in 1951 amounted to \$405,436.25, or an average of \$67,572.71 a month. Gross business for the last six months of 1953 amounted to \$161,229.84, or an average of \$26,871.64 a month.

10. In recording sales in the Daily Cash Book the petitioner's officers or agents made the errors following:

(a) In the month of August, 1949, taxable sales in the amount of \$270.24 were recorded as non-taxable sales.

(b) Through error in the footings in the Daily Cash Book for the month of June, 1951, total taxable sales were

recorded in the amount of \$49,110.66, whereas the correct total amount was \$49,110.00, or a difference of \$1,000.

(c) Through error in the footings in the Daily Cash Book for the month of July, 1951, total taxable sales were recorded in the amount of \$58,814.44, whereas the correct total amount of such sales was \$69,814.44, or a difference of \$11,000.

(d) Through error in the footings in the Daily Cash Book for August, 1951, total taxable sales were recorded in the amount of \$93,764.45, whereas the correct total amount was \$93,764.45, or a difference of \$10,000.

The above errors resulted in an understatement of taxable sales in the total amount of \$22,270.24, which were not reported to the Assessor, and in connection with which no sales tax has been paid by the petitioner.

11. In the Daily Cash Book for the period beginning with the month of March, 1950 through the month of August, 1951, there were recorded taxable sales in the amount of \$152,130.59 and non-taxable sales occurring in July, 1950, in the amount of \$5,463.00, or a total of \$157,602.80, not supported by any cash register tapes, nor identified in any other manner. By reason of such record, sales taxes were paid on the sales recorded as taxable, but no sales taxes have been paid upon sales recorded as non-taxable in the amount of \$5,463.00, for the month of July, 1950. The record does not disclose the character of the personal property or merchandise involved in the sales recorded as non-taxable.

12. In the month of May, 1952, the non-taxable sales according to the cash register tapes amounted to \$5,321.72, whereas the amount recorded as such in the Daily Cash Book was \$5,620.99, a taxable difference of \$299.27; and the taxable sales according to the cash register slips amounted to \$31,573.77, whereas the amount recorded as such in the Daily Cash Book was \$31,419.90, or a taxable difference of \$153.87, or a total taxable difference of \$453.14.

13. The months of October, November and December, 1953, were the only months in connection with which sales slips along with cash register tapes were introduced in evidence. In respect of cash delivery sales, taxable sales were registered on the cash registers as non-taxable in the months and amounts following: October, 1953, \$5.18,

November, 1953, \$14.57 and December, 1953, \$134.40; and sales without identity as to classification as follows: October, 1953, \$4.19, November, 1953, \$26.49 and December, 1953, \$63.29.

14. In connection with sales slips relating to collections on charge sales, taxable sales were registered on the cash registers as non-taxable sales in the months and amounts following: October, 1953, \$1.21, November, 1953, \$42.50 and December, 1953, \$11.27; and sales without identity of classification as follows: November, 1953, \$92.92 and December, 1953, \$10.50.

#### Opinion

The taxes here under attack by the taxpayer are deficiencies in sales taxes. It is important to note at the outset that the taxable periods are not monthly as required by the Sales Tax Act, (Chapter 26, Title 47, D. C. Code, 1951 Ed.) but are arbitrary periods of months, that is to say, one period of five months, one of seven months and two periods of one year each. Equally important it is to note that no deficiency in sales taxes was assessed by the Assessor against the respondent for the period from June 1, 1951 to May 31, 1952, that is to say, the taxable periods adopted by the Assessor are the following only:

August 1, 1949 to May 31, 1950

June 1, 1950 to May 31, 1951

June 1, 1952 to May 31, 1953

June 1, 1953 to December 31, 1953

The petitioning taxpayer assigns three errors committed by the Assessor in assessing the deficiencies here in question, namely, (a) taxes for the years 1949, 1950 and the first four months in 1951 are barred by the pertinent limitations; (b) the Assessor employed the incorrect method of accounting; and (c) the assessment was arbitrary and capricious. Assignment (b) is manifestly without merit. The other two assignments will be considered.

Section 149 of the Sales Tax Act (Sec. 47-2626, D. C. Code, 1951 Ed.) provides as follows:

"The Assessor shall determine, redetermine, assess, or reassess, any tax imposed by this title, except in cases where the tax is correct as computed in any return filed with the Assessor, within three years after the filing of any return, except as follows:

(a) In the case of a false return, or a failure to file a return whether in good faith or otherwise the tax may be assessed at any time.

(b) In the case of <sup>an</sup> incorrect return which has not been prepared as required by this title and by the return and instructions, rules, or regulations applicable thereto, the tax shall be assessed or reassessed within five years after the filing of such return."

It is assumed that the Assessor in assessing the deficiencies in sales taxes here involved relied upon Section 149, which in subparagraph (b) provides that, if a return is incorrect, that is to say, if it "has not been prepared as required by this title, etc", the tax shall be assessed or reassessed within five years after the filing of the return. The date of the assessment in this case was April 21, 1954, so that in respect to any incorrect return for the first effective month, namely, August, 1949, or for any subsequent month the deficiency was assessed in time; provided, of course, that the deficiency was clearly related to the month for which the incorrect return was filed.

The Court has found that in its return for the month of August, 1949, the petitioner understated its taxable sales by the sum of \$270.24, which results in a holding that such return was incorrect, since the Sales Tax Act and the pertinent regulations require that all of such sales be reported on the return. Therefore a reassessment or an assessment of a deficiency in sales taxes of 2 per centum of \$270.24, or a deficiency in sales taxes <sup>of</sup> \$5.40 by the Assessor for the month of August, 1949, would have been proper.

While the Court has found that, because of errors in the footings in the Daily Cash Book, understatements of taxable sales occurred in the returns filed by the petitioner for the months of June, 1951, in the amount of \$1,000, for the month of July, 1951, in the amount of \$11,000, ~~and~~ for the month of August, in the amount of \$10,000, and for the month of May, 1952, in the amount of \$512.84, such understatements have no place in this proceeding, except as affecting the probative value of the Daily Cash Book and the accounting procedure of the petitioner, because, as above observed,

the Assessor has not assessed any deficiency for the period from June 1, 1951 to May 31, 1952, and that period is not before the Court.

In the month of July, 1950, the petitioner had two sales, one in the amount of \$40.85 and one in the amount of \$5,422.75, or a total of \$5,463.61. Such sales were included in the amount of non-taxable sales in the return for that month. There is no record of such sales on the cash register tapes, and they are without identity of classification in any of the books or records of the petitioner. For that reason the return must be held to be incorrect, and the sales presumed to be taxable in accordance with Section 130 of the Sales Tax Act (Sec. 47-2607, D. C. Code, 1951, Ed.). The Assessor, therefore, could have properly assessed a deficiency in sales taxes for the month of July, 1950, equal to 2 per centum of \$5,463.61, or a deficiency in sales taxes of \$109.27.

The Court has found that because of failure of the petitioner's employees and officers to properly register and record taxable sales in the months of October, November and December, 1953, certain understatements of taxable sales resulted in the returns for those months, that is to say, for the months of October, 1953, \$10.50, for the month of November, 1953, \$170.70, and for the month of December, 1953, \$212.76. The Assessor, therefore, could have properly assessed deficiencies in sales taxes for the three months mentioned as follows: for October, 1953 a deficiency in sales taxes of 21 cents, for November, 1953, \$3.57 and for December, 1953, \$4.39.

The respondent insists that, because of the errors in the Daily Cash Book and in the accounting upon which it is based, ~~no~~ reliance can be placed upon neither the Daily Cash Book nor such accounting, and that the Court should deny the same any probative force, from which position or premise the respondent argues that the Court should hold that the petitioner has failed to maintain the burden of proof which it contends is cast upon the petitioner. On the other hand, the petitioner insisted at the trial that the Daily Cash Book and the supporting cash register tapes should be given full credence under the Shop Book Rule by which this Court is bound, since it was established by an Act of Congress. Such rule is found in Section 20-1732(a) of the United States Code, 1952 Edition, and is as follows:

"In any part of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind."

While there are several substantial and some inconsequential mistakes or omissions found upon somewhat of a spot check of the Daily Cash Book and supporting records that cast some suspicion thereon, the Court does not feel that such book and records can be disregarded. It should not be overlooked that upon the effective date of the Sales Tax Act the petitioner inaugurated a system of sales accounting or recordation designed especially to meet the requirements of that Act. The volume of business done by the petitioner during the period here under scrutiny was substantial and amounted to approximately \$2,000,000, and consisted of the sales of small items of merchandise with many millions of transactions. While the errors occurring in the months of June, July and August, 1951, were substantial and give the Court some pause, they could easily have been the result of unintentional mathematical mistakes, since all were in round numbers. While the other errors in those records were discovered in what might be considered as a "spot" check, the Court cannot assume that other errors would be unearthed, if all of the millions of transactions were examined. For these reasons the Court will rely upon the Daily Cash Book, except in those instances pointed out above, wherein additional taxes or deficiencies in sales taxes are appropriate in the amount specified.

Coming now to consider the remaining assignment of error in the petition, namely, that the assessment of the deficiencies in sales taxes for the four periods mentioned were arbitrary and capricious, it should be observed that the representative of the Assessor who made the investigation leading to assessment, testified that at the time he began the



same he had no information from any source that the books and records of the petitioner were inaccurate, incorrect, false or fraudulent. With- standing that and the additional fact that the Daily Cash Book and the cash register tapes covering the entire period from the effective date of the Sales Tax Act were shown, and made available to the auditor at all times, he limited his investigation to an audit or examination of invoices covering purchases of merchandise for the period from September 1, 1952 to August 31, 1953, together with a list of "mark-ups" in effect in the early part of January, 1954 and during a few months prior thereto. At the completion of such examination or audit the Assessor assessed deficiencies, not specifically for the year for which the examination had been made or for any month thereof, but for the four periods, from August 1, 1949, to May 31, 1950, from June 1, 1950 to May 31, 1951, from June 1, 1952, to May 31, 1953, and from June 1, 1953 to December 31, 1953. As far as the record discloses the Assessor reached into the thin air for the assessment of deficiencies for the periods other than the parts of those falling within the year commencing on September 1, 1952 and ending August 31, 1953.

The auditor of the Assessor's office looked at some ledger in the office of the accountant, for the petitioner and had before him the monthly returns. Apparently no use was made of the ledger, and all that the returns showed were total amounts under headings of "Gross Receipts," "Total Non-Tax- able Sales," and "Taxable Sales" and the tax due thereon, which in every instance had been paid. The returns agreed with the totals or footings in the Daily Cash Book and could not in themselves be of any use in determining a deficiency, except by an arbitrary increase by addition or percentage-wise. The Court cannot escape the conclusion that the assessment of the deficiencies involved were arbitrary, McLvering v. Taylor, 293 US 507, 55 S.Ct. 287, 79 L. Ed. 523.

Moreover, the Court does not believe that the method of assessment insofar as the same relates to the taxable period was proper.

The taxable period in the Sales Tax Act is monthly, just as the taxable period of the income tax is yearly, and each month stands by itself. If an error, intentional or not, is committed in the return for one month, it does not affect any other month or permit it to be reopened if correct

and beyond the three-year period. There are two returns mentioned in the Sales Tax Act. One is the monthly return upon which the tax is assessed and paid. The other is the annual return more in the nature of an information return provided for in Section 137 of the Act. Such a return is not really a tax return and is so regarded by the taxing authority of the District of Columbia, and the requirement of filing the same has been waived, except under certain conditions. (See C.O. 302,630/16, dated November 2, 1950, and Section 802 of Regulations, effective August 1, 1954, which embodies such ruling). It is clear, therefore, that the taxable period is monthly, and that the assessment of a deficiency without relation to such taxable period is not proper, especially in light of the limitations set up in the Sales Tax Act. All the sales taxes here involved should not, however, be cancelled but some should be reduced to the amount which the petitioner owes by reason of errors or understatement of taxable sales. Helvering v. Taylor, Supra; Andrew P. Solt, 19 T.C. 193, 188.

For the reasons stated the Court holds:

(a) That the sales taxes, penalties and interest in the total amount of \$1,253.67, assessed against the petitioner by the Assessor of the District of Columbia, for the period from August 1, 1949 to May 31, 1950, must be reduced to the following tax, penalty and interest:

Month	Sales Tax	Penalty 5%	Interest at 6% per annum 2/20/49 - 5/4/54	Total
August, 1949	25.40	1.27	31.51	57.18;

and that the petitioner is entitled to a refund of the difference, or \$1,276.49 for such taxable period, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

(b) That the sales taxes, penalties and interest in the total amount of \$1,366.98, assessed against the petitioner by the Assessor of the District of Columbia for the period from June 1, 1950 to May 31, 1951, must be reduced to the following tax, penalty, and interest:

<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest at 6% per annum 1/20/50 - 5/4/54</u>	<u>Total</u>
July, 1950	\$109.27	\$5.46	\$24.00	\$138.81;

and that the petitioner is entitled to a refund of the difference or \$1,228.17 for such taxable period, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

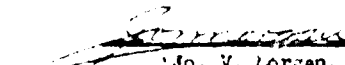
(c) That the sales taxes, penalties and interest in the total amount of \$131.03, assessed against the petitioner for the period from June 1, 1952, to May 31, 1953, must be cancelled, and that the petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

(d) That the sales taxes, penalties and interest in the total amount of \$141.79, assessed against the petitioner by the Assessor for the period from June 1, 1953 to December 31, 1953, must be reduced to the following taxes, penalties, and interest;

<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest at 6% per annum</u>	<u>Total</u>
Oct., 1953	\$0.21	\$0.01	11/20/53 - 5/4/54 \$0.00	\$0.22
Nov., 1953	\$3.50	\$0.18	12/20/53 - 5/4/54 \$0.07	\$3.83
Dec., 1953	\$4.32	\$0.22	1/20/54 - 5/4/54 \$0.07	\$4.68
Total	<u>\$8.13</u>	<u>\$0.41</u>	<u>\$0.14</u>	<u>\$8.73;</u>

and that the petitioner is entitled to a refund of the difference of \$133.06 for such taxable period, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

Decision will be entered in accordance with this opinion.

  
Jo. V. Lorgan,  
Judge

## DISTRICT OF COLUMBIA TAX COURT

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District of Columbia  
Tax Court

DOCKET NO. 1425

HILCO, INC.,

Petitioner,

vs.

DISTRICT OF COLUMBIA,

Respondent.

Decision

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof and of the evidence adduced at the hearing on said petition, it is, by the Court this 1st day of November, 1954

ADJUDGED AND DETERMINED as follows:

(a) That the sales taxes, penalties and interest in the total amount of \$1,283.67, assessed against the petitioner by the Assessor of the District of Columbia, for the period from August 1, 1949 to May 31, 1950, be, and the same is hereby reduced to the following tax, penalty and interest:

<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest at 6% per annum 9/20/49 - 5/4/54</u>	<u>Total</u>
August, 1949	\$5.40	\$ .27	\$1.51	\$7.18;

and that the petitioner is entitled to a refund of the difference, of \$1,276.49 for such taxable period, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

(b) That the sales taxes, penalties and interest in the total amount of \$1,366.98, assessed against the petitioner by the Assessor of the District of Columbia, for the period from June 1, 1950 to May 31, 1951, be, and the same is hereby reduced to the following tax, penalty, and interest:

<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest at 6% per annum 5/20/50 - 5/4/54</u>	<u>Total</u>
July, 1950	\$107.27	\$5.46	\$24.03	\$133.81;

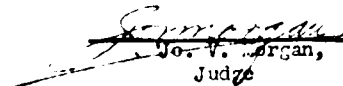
and that the petitioner is entitled to a refund of the difference or  
✓ \$1,228.17 for such taxable period, with interest thereon at the rate  
of 4 per centum per annum from May 4, 1954, to date of payment of  
refund.

(c) That the sales taxes, penalties and interest in the total  
amount of \$131.03, assessed against the petitioner for the period  
from June 1, 1952, to May 31, 1953, be and the same is hereby can-  
celled, and that the petitioner is entitled to a refund thereof,  
with interest thereon at the rate of 4 per centum per annum from  
May 4, 1954, to date of payment of refund.

(d) That the sales taxes, penalties and interest in the total  
amount of \$141.79, assessed against the petitioner by the Assessor  
for the period from June 1, 1953 to December 31, 1953, be and the  
same is hereby reduced to the following taxes, penalties and interest:

<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest at 6% per annum</u>	<u>Total</u>
Oct., 1953	\$0.21	\$0.01	11/20/53 - 5/4/54 \$0.00	\$0.22
Nov., 1953	\$3.58	\$0.18	12/20/53 - 5/4/54 \$0.07	\$3.83
Dec., 1953	\$4.32	\$0.22	1/20/54 - 5/4/54 \$0.07	\$4.61
Total	<u>\$8.11</u>	<u>\$0.41</u>	<u>\$0.14</u>	<u>\$8.73</u>

and that the petitioner is entitled to a refund of the difference of  
\$133.06 for such taxable period, with interest thereon at the rate  
of 4 per centum per annum from May 4, 1954, to date of payment of  
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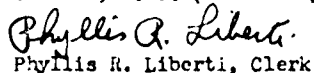
  
J. V. Morgan,  
Judge

Findings of Fact, Opinion and  
Decision served as follows:

Morris D. Schwartz, Esq.,  
Martin S. Becker, Esq.,  
711 14th Street, N. W.,  
Washington, D. C. (Mailed 11/1/54)

Assessor, D. C. (Personally 11/1/54)

Corporation Counsel, D. C. (Personally 11/1/54)

  
Phyllis R. Liberti, Clerk

DISTRICT OF COLUMBIA TAX COURT

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FINDINGS of FACT and OPINION

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Findings of Fact

1. The petitioner is a corporation with its principal place of business at 2016 Fourteenth Street, Northwest, Washington, D. C. It is, and was during the taxable period engaged in the retail sale of alcoholic liquors, groceries and the like.

2. The sales of merchandise by the petitioner, with few exceptions, during the taxable period involved, namely from August 1, 1949 to December 31, 1953, were registered by cash registers and recorded on paper tapes in such registers as to number of transaction, amount and general character of the merchandise sold.

3. Upon the effective date of the District of Columbia Sales Tax Act, namely, August 1, 1949, and for the purposes of recording and reporting its sales as required by that Act, the petitioner opened an account or book called "Daily Cash Book" and inaugurated a system whereby the character of the merchandise sold as to taxability

or non-taxability was purported to be shown on the paper tapes recorded in the cash register. The plan further involved the transfer of the information on the tapes to the Daily Cash Book, and the use of such latter record in preparing the monthly returns of gross sales and other information required by the Sales Tax Act and the pertinent regulations.

4. Beginning with the month of August, 1949 and for every month thereafter up to and including the month of December, 1953, the petitioner filed with the Assessor its return of gross sales under the Sales Tax Act as reflected by the footings in the Daily Cash Book, and paid the sales taxes shown to be due on such returns.

5. At the end of the taxable period here involved an investigation of petitioner's business was made by an auditor of the Sales and Use Tax Division of the Assessor's office. Although all the books and records of the petitioner were made available to such auditor, his audit or investigation was limited to an examination of invoices showing purchases of merchandise by the petitioner during one year, namely, from September 1, 1952, to August 31, 1953. From such examination he ascertained the total amount of purchases for that fiscal year and the portion thereof that represented the purchase price of taxable and non-taxable merchandise. He then called upon the petitioner for information concerning the "mark-up" on various items of merchandise, that is to say, the difference between the cost and selling price. No period was specified in the request, but its language indicated that such information was to relate to the date of the request, December 21, 1953. Shortly after the first of the calendar year 1954 the petitioner supplied the information relating to such "mark-ups" or differentials, effective as of that time, and during four or five months immediately prior thereto.

6. Thereafter, to wit, on April 21, 1954, the Assessor assessed the petitioner deficiencies in sales taxes, with interest and penalties for the periods and in the amounts following:

<u>Period</u>	<u>Tax</u>	<u>5% Penalty</u>	<u>Interest</u>	<u>Total</u>
Aug. 1 1949 to May 31 1950	\$292.37	\$14.62	\$346.68	\$1,003.67
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June 1 1952 to May 31 1953	116.03	5.80	9.20	131.03
June 1 1953 to Dec 31 1953	<u>131.07</u>	<u>6.55</u>	<u>4.17</u>	<u>141.79</u>
<b>Total</b>	<u>\$2,168.44</u>	<u>\$108.42</u>	<u>\$646.61</u>	<u>\$2,923.47</u>

7. The petitioner paid the foregoing deficiencies, penalties and interest on May 4, 1954. This proceeding was filed on June 17, 1954.

8. As reflected by the Daily Cash Book, the total receipts from the petitioners' business during the period here involved, namely, fifty-three months, from August 1, 1949 to December 31, 1953, amounted to \$2,090,236.43, consisting of millions of items, most of which in small amounts and many in amounts of a few cents. According to the Daily Cash Book the taxable sales during the taxable period out of the total amounted to \$1,555,188.23, which the petitioner reported monthly and paid the two per centum sales taxes thereon.

9. The business of the petitioner in respect of gross receipts was not constant during the taxable period here involved, but varied substantially from time to time. The largest amount of business done in one month was transacted in the month of August, 1951, and amounted to \$97,949.70, while the smallest amount, namely \$23,304.41, was done in September, 1953. Gross business for the first five months of the taxable period, August 1, 1949 to December 31, 1949, amounted to \$165,417.44, or an average of \$33,139.44 a month. Gross Business for the last six months in 1951 amounted to \$405,436.25, or an average of \$67,572.71 a month. Gross business for the last six months of 1953 amounted to \$161,229.84, or an average of \$26,871.64 a month.

10. In recording sales in the Daily Cash Book the petitioner's officers or agents made the errors following:

(a) In the month of August, 1949, taxable sales in the amount of \$270.24 were recorded as non-taxable sales.

(b) Through error in the footings in the Daily Cash Book for the month of June, 1951, total taxable sales were



recorded in the amount of \$48,110.66, whereas the correct total amount was \$49,110.66, or a difference of \$1,000.

(c) Through error in the footings in the Daily Cash Book for the month of July, 1951, total taxable sales were recorded in the amount of \$58,814.44, whereas the correct total amount of such sales was \$69,814.44, or a difference of \$11,000.

(d) Through error in the footings in the Daily Cash Book for August, 1951, total taxable sales were recorded in the amount of \$83,764.45, whereas the correct total amount was \$93,764.45, or a difference of \$10,000.

The above errors resulted in an understatement of taxable sales in the total amount of \$22,270.24, which were not reported to the Assessor, and in connection with which no sales tax has been paid by the petitioner.

11. In the Daily Cash Book for the period beginning with the month of March, 1950 through the month of August, 1951, there were recorded taxable sales in the amount of \$152,136.59 and non-taxable sales occurring in July, 1950, in the amount of \$5,463.00, or a total of \$157,602.80, not supported by any cash register tapes, nor identified in any other manner. By reason of such record, sales taxes were paid on the sales recorded as taxable, but no sales taxes have been paid upon sales recorded as non-taxable in the amount of \$5,463.00, for the month of July, 1950. The record does not disclose the character of the personal property or merchandise involved in the sales recorded as non-taxable.

12. In the month of May, 1952, the non-taxable sales according to the cash register tapes amounted to \$5,321.72, whereas the amount recorded as such in the Daily Cash Book was \$5,600.69, a taxable difference of \$278.97; and the taxable sales according to the cash register slips amounted to \$31,573.77, whereas the amount recorded as such in the Daily Cash Book was \$31,419.90, or a taxable difference of \$153.87, or a total taxable difference of \$432.84.

13. The months of October, November and December, 1953, were the only months in connection with which sales slips along with cash register tapes were introduced in evidence. In respect of cash delivery sales, taxable sales were registered on the cash registers as non-taxable in the months and amounts following: October, 1953, \$5.18,

November, 1953, \$16.57 and December, 1953, \$134.40; and sales without identity as to classification as follows: October, 1953, \$4.19, November, 1953, \$26.49 and December, 1953, \$63.29.

14. In connection with sales slips relating to collections on charge sales, taxable sales were registered on the cash registers as non-taxable sales in the months and amounts following: October, 1953, \$1.21, November, 1953, \$42.50 and December, 1953, \$11.27; and sales without identity of classification as follows: November, 1953, \$92.92 and December, 1953, \$10.80.

#### Opinion

The taxes here under attack by the taxpayer are deficiencies in sales taxes. It is important to note at the outset that the taxable periods are not monthly as required by the Sales Tax Act, (Chapter 26, Title 47, D. C. Code, 1951 Ed.) but are arbitrary periods of months, that is to say, one period of five months, one of seven months and two periods of one year each. Equally important it is to note that no deficiency in sales taxes was assessed by the Assessor against the respondent for the period from June 1, 1951 to May 31, 1952, that is to say, the taxable periods adopted by the Assessor are the following only:

August 1, 1949 to May 31, 1950

June 1, 1950 to May 31, 1951

June 1, 1952 to May 31, 1953

June 1, 1953 to December 31, 1953

The petitioning taxpayer assigns three errors committed by the Assessor in assessing the deficiencies here in question, namely, (a) taxes for the years 1949, 1950 and the first four months in 1951 are barred by the pertinent limitations; (b) the Assessor employed the incorrect method of accounting; and (c) the assessment was arbitrary and capricious. Assignment (b) is manifestly without merit. The other two assignments will be considered.

Section 149 of the Sales Tax Act (Sec. 47-2626, D. C. Code, 1951 Ed.) provides as follows:

November, 1953, \$16.57 and December, 1953, \$134.40; and sales without identity as to classification as follows: October, 1953, \$4.19, November, 1953, \$26.49 and December, 1953, \$63.29.

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#### Opinion

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June 1, 1953 to December 31, 1953

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Section 149 of the Sales Tax Act (Sec. 47-2626, D. C. Code, 1951 Ed.) provides as follows:

"The Assessor shall determine, redetermine, assess, or reassesses, any tax imposed by this title, except in cases where the tax is correct as computed in any return filed with the Assessor, within three years after the filing of any return, except as follows:

(a) In the case of a false return, or a failure to file a return whether in good faith or otherwise the tax may be assessed at any time.

an  
(b) In the case of incorrect return which has not been prepared as required by this title and by the return and instructions, rules, or regulations applicable thereto, the tax shall be assessed or reassessed within five years after the filing of such return."

It is assumed that the Assessor in assessing the deficiencies in sales taxes here involved relied upon Section 149, which in subparagraph (b) provides that, if a return is incorrect, that is to say, if it "has not been prepared as required by this title, etc", the tax shall be assessed or reassessed within five years after the filing of the return. The date of the assessment in this case was April 21, 1954, so that in respect to any incorrect return for the first effective month, namely, August, 1949, or for any subsequent month the deficiency was assessed in time; provided, of course, that the deficiency was clearly related to the month for which the incorrect return was filed.

The Court has found that in its return for the month of August, 1949, the petitioner understated its taxable sales by the sum of \$270.24, which results in a holding that such return was incorrect, since the Sales Tax Act and the pertinent regulations require that all of such sales be reported on the return. Therefore a reassessment or an assessment of a deficiency in sales taxes of 2 per centum of \$270.24, or a deficiency in sales taxes of \$5.40 by the Assessor for the month of August, 1949, would have been proper.

While the Court has found that, because of errors in the footings in the Daily Cash Book, understatements of taxable sales occurred in the returns filed by the petitioner for the months of June, 1951, in the amount of \$1,000, for the month of July, 1951, in the amount of \$11,000, ~~and~~ for the month of August, in the amount of \$10,000, and for the month of May, 1952, in the amount of \$512.84, such understatements have no place in this proceeding, except as affecting the probative value of the Daily Cash Book and the accounting procedure of the petitioner, because, as above observed,

the Assessor has not assessed any deficiency for the period from June 1, 1951 to May 31, 1952, and that period is not before the Court.

In the month of July, 1950, the petitioner had two sales, one in the amount of \$40.86 and one in the amount of \$5,422.75, or a total of \$5,463.61. Such sales were included in the amount of non-taxable sales in the return for that month. There is no record of such sales on the cash register tapes, and they are without identity of classification in any of the books or records of the petitioner. For that reason the return must be held to be incorrect, and the sales presumed to be taxable in accordance with Section 130 of the Sales Tax Act (Sec. 47-2607, D. C. Code, 1951, Ed.). The Assessor, therefore, could have properly assessed a deficiency in sales taxes for the month of July, 1950, equal to 2 per centum of \$5,463.61, or a deficiency in sales taxes of \$109.27.

The Court has found that because of failure of the petitioner's employees and officers to properly register and record taxable sales in the months of October, November and December, 1953, certain understatements of taxable sales resulted in the returns for those months, that is to say, for the months of October, 1953, \$10.55, for the month of November, 1953, \$175.75, and for the month of December, 1953, \$219.76. The Assessor, therefore, could have properly assessed deficiencies in sales taxes for the three months mentioned as follows: for October, 1953 a deficiency in sales taxes of 21 cents, for November, 1953, \$3.50 and for December, 1953, \$4.39.

The respondent insists that, because of the errors in the Daily Cash Book and in the accounting upon which it is based, ~~no~~ reliance can be placed upon neither the Daily Cash Book nor such accounting, and that the Court should deny the same any probative force, from which position or premise the respondent argues that the Court should hold that the petitioner has failed to maintain the burden of proof which it contends is cast upon the petitioner. On the other hand, the petitioner insisted at the trial that the Daily Cash Book and the supporting cash register tapes should be given full credence under the Shop Book Rule by which this Court is bound, since it was established by an Act of Congress. Such rule is found in Section 23-1732(a) of the United States Code, 1952 Edition, and is as follows:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind."

While there are several substantial and some inconsequential mistakes or omissions found upon somewhat of a spot check of the Daily Cash Book and supporting records that cast some suspicion thereon, the Court does not feel that such book and records can be disregarded. It should not be overlooked that upon the effective date of the Sales Tax Act the petitioner inaugurated a system of sales accounting or recordation designed especially to meet the requirements of that Act. The volume of business done by the petitioner during the period here under scrutiny was substantial and amounted to approximately \$2,000,000, and consisted of the sales of small items of merchandise with many millions of transactions. While the errors occurring in the months of June, July and August, 1951, were substantial and give the Court some pause, they could easily have been the result of unintentional mathematical mistakes, since all were in round numbers. While the other errors in those records were discovered in what might be considered as a "spot" check, the Court cannot assume that other errors would be unearthed, if all of the millions of transactions were examined. For these reasons the Court will rely upon the Daily Cash Book, except in those instances pointed out above, wherein additional taxes or deficiencies in sales taxes are appropriate in the amount specified.

Coming now to consider the remaining assignment of error in the petition, namely, that the assessment of the deficiencies in sales taxes for the four periods mentioned were arbitrary and capricious, it should be observed that the representative of the Assessor who made the investigation leading to assessment, testified that at the time he began the

same he had no information from any source that the books and records of the petitioner were inaccurate, incorrect, false or fraudulent. With- standing that and the additional fact that the Daily Cash Book and the cash register tapes covering the entire period from the effective date of the Sales Tax Act were shown, and made available to the auditor at all times, he limited his investigation to an audit or examination of invoices covering purchases of merchandise for the period from September 1, 1952 to August 31, 1953, together with a list of "mark-ups" in effect in the early part of January, 1954 and during a few months prior thereto. At the completion of such examination or audit the Assessor assessed deficiencies, not specifically for the year for which the examination had been made or for any month thereof, but for the four periods, from August 1, 1949, to May 31, 1950, from June 1, 1950 to May 31, 1951, from June 1, 1952, to May 31, 1953, and from June 1, 1953 to December 31, 1953. As far as the record discloses the Assessor reached into the thin air for the assessment of deficiencies for the periods other than the parts of those falling within the year commencing on September 1, 1952 and ending August 31, 1953.

The auditor of the Assessor's office looked at some ledger in the office of the accountant, for the petitioner and had before him the monthly returns. Apparently no use was made of the ledger, and all that the returns showed were total amounts under headings of "Gross Receipts," "Total Non-Tax- able Sales," and "Taxable Sales" and the tax due thereon, which in every instance had been paid. The returns agreed with the totals or footings in the Daily Cash Book and could not in themselves be of any use in determining a deficiency, except by an arbitrary increase by addition or percentage-wise. The Court cannot escape the conclusion that the assessment of the deficiencies involved were arbitrary, McLvering v. Taylor, 293 US 507, 55 S.Ct. 287, 79 L. Ed. 623.

Moreover, the Court does not believe that the method of assessment insofar as the same relates to the taxable period was proper.

The taxable period in the Sales Tax Act is monthly, just as the taxable period of the income tax is yearly, and each month stands by itself. If an error, intentional or not, is committed in the return for one month, it does not affect any other month or permit it to be reopened if correct

and beyond the three-year period. There are two returns mentioned in the Sales Tax Act. One is the monthly return upon which the tax is assessed and paid. The other is the annual return more in the nature of an information return provided for in Section 137 of the Act. Such a return is not really a tax return and is so regarded by the taxing authority of the District of Columbia, and the requirement of filing the same has been waived, except under certain conditions. (See C.O. 302,630/16, dated November 2, 1950, and Section 802 of Regulations, effective August 1, 1954, which embodies such ruling). It is clear, therefore, that the taxable period is monthly, and that the assessment of a deficiency without relation to such taxable period is not proper, especially in light of the limitations set up in the Sales Tax Act. All the sales taxes here involved should not, however, be cancelled but some should be reduced to the amount which the petitioner owes by reason of errors or understatement of taxable sales.

Helvering v. Taylor, Supra; Andrew P. Solt. 19 T.C. 183, 188.

For the reasons stated the Court holds:

(a) That the sales taxes, penalties and interest in the total amount of \$1,283.67, assessed against the petitioner by the Assessor of the District of Columbia, for the period from August 1, 1949 to May 31, 1950, must be reduced to the following tax, penalty and interest:

<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest at 6% per annum 9/20/49 - 5/4/54</u>	<u>Total</u>
August, 1949	\$5.40	\$ .27	\$1.51	\$7.18;

and that the petitioner is entitled to a refund of the difference, or \$1,276.49 for such taxable period, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

(b) That the sales taxes, penalties and interest in the total amount of \$1,366.98, assessed against the petitioner by the Assessor of the District of Columbia for the period from June 1, 1950 to May 31, 1951, must be reduced to the following tax, penalty, and interest:



<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest at 6% per annum 1/20/50 - 5/4/54</u>	<u>Total</u>
July, 1950	\$109.27	\$5.46	\$24.03	\$138.81;

and that the petitioner is entitled to a refund of the difference or \$1,228.17 for such taxable period, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

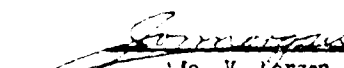
(c) That the sales taxes, penalties and interest in the total amount of \$131.03, assessed against the petitioner for the period from June 1, 1952, to May 31, 1953, must be cancelled, and that the petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

(d) That the sales taxes, penalties and interest in the total amount of \$141.79, assessed against the petitioner by the Assessor for the period from June 1, 1953 to December 31, 1953, must be reduced to the following taxes, penalties, and interest:

<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest at 6% per annum</u>	<u>Total</u>
Oct., 1953	\$0.21	\$0.01	11/20/53 - 5/4/54 \$0.00	\$0.22
Nov., 1953	\$3.58	\$0.18	12/20/53 - 5/4/54 \$0.07	\$3.83
Dec., 1953	\$4.32	\$0.22	1/20/54 - 5/4/54 \$0.07	\$4.69
Total	<u>\$8.11</u>	<u>\$0.41</u>	<u>\$0.14</u>	<u>\$8.73;</u>

and that the petitioner is entitled to a refund of the difference of \$133.06 for such taxable period, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

Decision will be entered in accordance with this opinion.

  
Jo. V. Eorgan,  
Judge

## DISTRICT OF COLUMBIA TAX COURT

FILED

HELICO, INC.,

Petitioner,

vs.

DISTRICT OF COLUMBIA,

Respondent.

NOV 1 1954

District of Columbia  
Tax Court

DOCKET NO. 1425

Decision

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof and of the evidence adduced at the hearing on said petition, it is, by the Court this 1st day of November, 1954

ADJUDGED AND DETERMINED as follows:

(a) That the sales taxes, penalties and interest in the total amount of \$1,283.67, assessed against the petitioner by the Assessor of the District of Columbia, for the period from August 1, 1949 to May 31, 1950, be, and the same is hereby reduced to the following tax, penalty and interest:

Month	Sales Tax	Penalty 5%	Interest at 6% per annum 9/20/49 - 5/4/54	Total
August, 1949	\$5.40	\$ .27	\$1.51	\$7.18;

and that the petitioner is entitled to a refund of the difference, of \$1,276.49 for such taxable period, with interest thereon at the rate of 4 per centum per annum from May 4, 1954, to date of payment of refund.

(b) That the sales taxes, penalties and interest in the total amount of \$1,366.98, assessed against the petitioner by the Assessor of the District of Columbia, for the period from June 1, 1950 to May 31, 1951, be, and the same is hereby reduced to the following tax, penalty, and interest:

Month	Sales Tax	Penalty 5%	Interest at 6% per annum 9/20/50 - 5/4/54	Total
July, 1950	\$109.27	\$5.46	\$24.03	\$138.81;

and that the petitioner is entitled to a refund of the difference or  
 ✓ \$1,228.17 for such taxable period, with interest thereon at the rate  
 of 4 per centum per annum from May 4, 1954, to date of payment of  
 refund.

(c) That the sales taxes, penalties and interest in the total  
 amount of \$131.03, assessed against the petitioner for the period  
 from June 1, 1952, to May 31, 1953, be and the same is hereby can-  
 celled, and that the petitioner is entitled to a refund thereof,  
 with interest thereon at the rate of 4 per centum per annum from  
 May 4, 1954, to date of payment of refund.

(d) That the sales taxes, penalties and interest in the total  
 amount of \$141.79, assessed against the petitioner by the Assessor  
 for the period from June 1, 1953 to December 31, 1953, be and the  
 same is hereby reduced to the following taxes, penalties and interest:

<u>Month</u>	<u>Sales Tax</u>	<u>Penalty 5%</u>	<u>Interest At 6% per annum</u>	<u>Total</u>
Oct., 1953	\$0.21	\$0.01	11/20/53 - 5/4/54-\$0.00	\$0.22
Nov., 1953	\$3.58	\$0.18	12/20/53 - 5/4/54-\$0.07	\$3.83
Dec., 1953	\$4.39	\$0.22	1/20/54 - 5/4/54-\$0.07	\$4.68
Total	<u>\$8.18</u>	<u>\$0.41</u>	<u>\$0.14</u>	<u>\$8.73</u>

and that the petitioner is entitled to a refund of the difference of  
 \$133.06 for such taxable period, with interest thereon at the rate  
 of 4 per centum per annum from May 4, 1954, to date of payment of  
 refund.

*Joseph V. Morgan*  
 Joseph V. Morgan,  
 Judge

Findings of Fact, Opinion and  
 Decision served as follows:

Morris D. Schwartz, Esq.,  
 Martin G. Becker, Esq.,  
 711 14th Street, N. W.,  
 Washington, D. C. (Mailed 11/1/54)

Assessor, D. C. (Personally 11/1/54)

Corporation Counsel, D. C. (Personally 11/1/54)

*Phyllis R. Liberti*  
 Phyllis R. Liberti, Clerk